2001

State of Utah v. Matthew L. Despain : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Petitioner/Appellee,	:	Case No. 20010761-CA
v.	:	
MATTHEW L. DESPAIN,	:	
Respondent/Appellant.	:	

APPELLEE'S REHEARING PETITION

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REHEARING ISSUE

Should this Court have decided whether the trial court erred in considering Officer Slaugh's knowledge of defendant in determining whether Officer Olson had reasonable suspicion to ask defendant about weapons where (1) neither party briefed the issue; (2) the issue is one of first impression in Utah; (3) substantial case law allows attribution of knowledge amongst officers working closely in concert; and (4) determination of the issue was not necessary to the Court's final decision in this case?

CASE STATEMENT

Defendant was charged by information with operating a clandestine laboratory and possession or use of a controlled substance with a prior conviction, both second degree felonies; transportation or possession of items prohibited in a correctional or mental health facility, a third degree felony; reckless endangerment, a class A misdemeanor; and

possession of drug paraphernalia and carrying a concealed dangerous weapon, both class B misdemeanors (R. 3-5). A forfeiture demand was also entered. (*Id.*) Defendant filed a motion to suppress evidence obtained through a search of his vehicle and attached trailer (R. 38-45). Following a hearing, the trial court entered a written ruling denying defendant's motion (R. 46-52).

Defendant entered a conditional guilty plea to operation of a clandestine laboratory, reserving his right to appeal the trial court's denial of his motion to suppress (R. 64-71, 74-75). Defendant was sentenced to an indeterminate prison term of one to fifteen years (R. 77-81). That sentence was suspended, however, and defendant was ordered to serve nine months in jail and 36 months probation (*Id.*). The court also ordered defendant's forfeiture of $1,416.00 cash found in the search (R. 72-73).

Defendant timely appealed his conviction (R. 84-85). This Court affirmed his conviction in a published opinion filed July 25, 2003. *See State v. Despain*, 2003 UT App 266 (attached at Addendum A).

ARGUMENT

The State seeks rehearing to address one sentence and its related footnote in the Court's opinion that conclusorily decides an issue of first impression in Utah that was not briefed by the parties and that is not necessary to the Court's final decision:

> Despain argues that the trial court erred in relying upon the prior encounter between Slaugh and Despain to support its decision that Olsen's question was supported by reasonable suspicion. We agree.[3] However, "[i]t is well settled that we may affirm a judgment of a lower

> court if it is sustainable on any legal ground or theory apparent on the record." *State v. Finlayson*, 2000 UT 10, ¶ 31, 994 P.2d 1243.[4]

State v. Despain, 2003 UT App 266, ¶ 10. Footnote 3 then states:

> The trial court relied on the prior contact between Slaugh and Despain to support its decision to deny Despain's motion to suppress. However, Slaugh merely asked Despain for his license and registration, while it was Olsen who asked Despain about weapons. Moreover, Olsen did not know of the prior encounter between Slaugh and Despain and the testimony of Slaugh makes clear that Olsen had no reason to believe anything more than a simple traffic stop was occurring prior to their approaching the truck to complete the traffic stop. Accordingly, because Olsen had no history with Despain and was not aware of Slaugh's history with Despain, the trial court erred in considering the prior encounter as material to the issue.

Id. at ¶ 10 n.3. Footnote 3 includes no citation to legal authority.

For the reasons stated below, the State respectfully asks this Court to remove footnote 3 from its opinion and to amend paragraph 10 as follows:

> Despain argues that the trial court erred in relying upon the prior encounter between Slaugh and Despain to support its decision that Olsen's question was supported by reasonable suspicion. We ***do not reach this issue, however, because*** "[i]t is well settled that we may affirm a judgment of a lower court if it is sustainable on any legal ground or theory apparent on the record." *State v. Finlayson*, 2000 UT 10, ¶ 31, 994 P.2d 1243.[3]

(alterations bolded and italicized). The State thus asks this Court to amend its opinion to remove the challenged sentence and footnote and, as it did with another issue in this case, "reserve [its] analysis of the [issue] for an appropriate case." *Despain*, 2003 UT 266, ¶ 9 n.2.

The State does not seek to alter the result, and the corrections the State seeks will not do so.

I. Relevant proceedings.

At defendant's preliminary hearing, Officer Olson testified that he did not remember Officer Slaugh telling him anything about defendant prior to stopping defendant's vehicle (R. 87:82). Officer Olson, however, never ruled out that possibility. Rather, he testified, "It's very possible. He could have" (R. 87:82). "I don't specifically recall the exact words, but its possible" (R. 87:83).

Prior to trial, defendant filed a motion to suppress the evidence gathered in connection with his arrest (R. 38-45). Defendant's memorandum in support of his motion did not include any argument that Officer Olson lacked reasonable suspicion to question him about weapons because Officer Olson lacked the knowledge Officer Slaugh had concerning him (*see id.*). In fact, throughout the memorandum, defendant referred to the officers interchangeably, as if they were one (*see id.*).

At the suppression hearing, Officer Slaugh testified that, as soon as he heard that the truck they were following was registered to defendant, he became concerned that defendant might be armed because of a prior incident in which defendant had been found in possession of a concealed weapon (R. 106:40). However, Officer Slaugh did not have a conversation with Officer Olson before exiting their vehicle concerning defendant or Officer Slaugh's prior encounter with him (R. 106:41-42). Officer Olson did not testify at the suppression hearing.

In its suppression ruling, the trial court concluded:

> As one officer is asking for a license, another officer was asking whether Mr. Despain had any weapons. In light of the officer's previously dealings with the defendant, approximately thirty days before, he knew that he had been recently armed with a handgun and considered armed and dangerous.
>
> Therefore, in light of the very recent history, the inquiry, for officer safety was authorized.

(R. 48).

In his docketing statement, defendant indicated that he wished to challenge "[w]hether the officers had reasonable suspicion to stop [his] vehicle[;] and [w]hether the scope of the subsequent detention exceeded justification for the stop." *See* Docketing Statement at 2.[1] Nowhere did defendant indicate that he wished to address whether Officer Olson was aware of Officer Slaugh's prior knowledge of defendant. *See id.*

In his brief on appeal, defendant treated Officers Slaugh and Olson as if both were familiar with defendant from a prior arrest. *See* Aplt. Br. at 4 ("Olsen asked the question about weapons because about one month earlier he had stopped the appellant [and] [a]t that time the appellant was carrying a firearm."). None of his arguments challenged whether the trial court properly considered defendant's prior contact with Officer Slaugh in concluding that Officer Olson had reasonable suspicion to ask defendant about weapons. *See* Aplt. Br. at 6-19. Rather, defendant only challenged generally whether the circumstances of the stop, in conjunction with the officers' prior knowledge, provided reasonable suspicion to question defendant about weapons. *See id.*

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[1]Defendant raises two other issues in his docketing statement; however, neither concerns the initial stop and questioning of defendant.

As a consequence, the State did not address any differences between Officer Slaugh's knowledge and Officer Olson's knowledge—or the legal significance of any differences—in its responsive brief. *See* Aple. Br. at 7-22.

For the first time during oral argument, defense counsel distinguished between what Officer Slaugh knew and what Officer Olson knew at the time defendant was questioned. *See* 17 April 2003 Oral Argument. Defense counsel first noted that, at the suppression hearing, Officer Slaugh testified that he did not tell Officer Olson about his prior encounter with defendant before they stopped defendant for the taillight violation. *See id.* He then noted that Officer Olson did not testify at the suppression hearing. *See id.* Counsel concluded: "So what you've got is a situation that, an officer who we don't know if he knew about the prior encounter, is asking about the weapons." *Id.*

When Judge Thorne questioned counsel concerning whether the trial court could consider Officer Slaugh's prior knowledge about defendant in rendering its decision, defense counsel again stated, "Part of the problem with that though is, judge, that the officer who asked the question is not the officer who was involved there." *Id.* Judge Thorne then noted, "From Judge Davis's ruling, it's not clear that that's what he found." *Id.* Counsel responded: "[P]art of the problem with that is that . . . we don't know if Olson had that knowledge and in terms of the reasonable suspicion analysis, I think we need to have some showing that when asking the question . . . that particular officer had that as a basis of his suspicion." *Id.* Judge Thorne continued, "But if you're challenging that finding, don't you have to marshal the evidence that would have supported Judge Davis's conclusion?" *Id.* Counsel concluded

that the evidence concerning Officer Slaugh's prior encounter was in the record; the only question was whether Officer Olson knew about it. *See id.*

In response, the State argued that, even absent a determination of whether Officer Olson knew about Officer Slaugh's prior interaction with defendant, there was an abundance of reasonable suspicion to ask defendant about weapons. *See id.*

In its opinion, this Court agreed with the State that, even absent evidence that Officer Olson knew about Officer Slaugh's prior knowledge of defendant, the evidence was sufficient to establish reasonable suspicion to ask defendant about whether he had weapons. *See Despain*, 2003 UT App 266, ¶ 11. This Court nonetheless decided that, absent proof that Officer Olson knew about Officer Slaugh's prior knowledge of defendant, "the trial court erred in considering the prior encounter as material to the issue." *See id.*, 2003 UT App 266, ¶ 10, n.3. This Court did so even while deciding not to reach another issue—which was actually briefed by the parties—because "our conclusion that Despain's behavior following the stop reasonably led the officers to believe that he was armed and dangerous forecloses any need to [address that issue]." *Id.*, 2003 UT App 266, ¶ 9 n.2.

II. This Court should amend its opinion to remove an unsupported ruling on an issue of first impression that was not briefed by the parties.

"'It is generally inappropriate to raise issues at oral argument that have not been designated as issues on appeal in a docketing statement or in the briefs.'" *State v. Arviso*, 1999 UT App 381, ¶ 4 n.2, 993 P.2d 894 (quoting *State v. Babbell*, 770 P.2d 987, 994 (Utah 1989)).

The reasons for this rule are two-fold. "First, this rule protects the opposing party, which receives no notice as to any issues not found in the docketing statement or briefs and therefore has no chance to prepare to refute the unbriefed issues at oral argument with a reasoned analysis supported by legal authority." *Id.* "Second," as in this case, "when [defendant] raised this new issue at oral argument, he offered no supporting legal authority." *Id.*

Thus, this Court generally does not reach issues raised only during oral argument. *See id.* ("'It is . . . well settled that this court need not address issues that a party has not briefed.'") (quoting *Maack v. Resource Design & Constr., Inc.*, 875 P.2d 570, 575 n.3 (Utah App 1994)); *see also Gilley v. Blackstock*, 2002 UT App 414, ¶ 10 n.2, 61 P.3d 305 (refusing to reach issue raised "[i]n earlier proceedings and at oral argument" where party "did not argue this issue in her brief").

In this case, defendant did not challenge the trial court's assumption that Officer Olson was aware of Officer Slaugh's prior encounter with defendant at trial, in his docketing statement, or in his brief on appeal. Thus, the State had no opportunity to brief that issue on the merits. Moreover, when he raised the issue at oral argument, defendant provided no legal support for his claim that the trial court erred in relying on that assumption in finding reasonable suspicion to question defendant about his weapons.

Under such circumstances, this Court should not have reached the merits of this issue in its opinion. *See Arviso*, 1999 UT App 381, ¶ 4 n.2. This is especially so where, as here, a holding on this issue was not necessary to this Court's final decision. *See Despain*, 2003

UT App 266, ¶ 10 ("However, '[i]t is well settled that we may affirm a judgment of a lower court if if is sustainable on any legal ground or theory apparent on the record.'") (citation omitted). The State therefore respectfully asks this Court to amend its opinion to omit the merits discussion of this issue.

III. This Court should amend its opinion to remove an unsupported ruling on an unbriefed issue of first impression where other jurisdictions have applied the "collective knowledge rule" under similar fact scenarios

In *State v. Dorsey*, 731 P.2d 1085, 1088 (Utah 1986), the supreme court held that, "[i]n making a probable cause determination, a police officer is entitled to rely on information gained from other officers." The court then cited approvingly a case holding that "'when officers are involved together in an operation and there is communication between them, the collective knowledge of the officers is considered in determining whether there was probable cause for the search.'" *Id.* at 1089 (quoting *United States v. Esle*, 743 F.2d 1465, 1476 (11th Cir. 1984)).

However, the State has found no Utah appellate court decision addressing the extent to which *Dorsey*'s "collective knowledge" rule applies in the absence of evidence of communication between the officers.

The general rule appears to be that, when the officers at issue have not actually worked together on a case, communication is absolutely required. *See, e.g.*, Wayne R. LaFave, *Search & Seizure* § 3.5(c), pp. 265-67 (3d ed. 1996) [hereinafter *Search & Seizure*] (suggesting that rule requiring communication "is sound, and should unquestionably be applied . . . where the officer who did possess the probable cause was not in close time-space

proximity to the questioned arrest or search."); *State v. Hicks*, 488 N.W.2d 359, 363 (Neb. 1992) (noting "collective knowledge of the law enforcement agency for which an officer acts may provide the basis for a search and seizure, but some communication of that knowledge to the officer conducting the search and seizure is required") (citation omitted).

However, "when this other officer is at hand, it is to be doubted whether [the requirement of actual communication] is inevitably compelled." *Search & Seizure*, § 3.5(c) at pp. 267-69 & n.75. In fact, a number of jurisdictions, including the Tenth Circuit Court of Appeals, have held or at least intimated that proof of actual communication is not required when the officer having the information works in close proximity to the officer conducting the search. *See, e.g., United States v. Shareef*, 100 F.3d 1491, 1504 (10th Cir. 1996) ("Even in the absence of evidence of communication among officers, however, when officers act collectively it may sometimes be appropriate to look to their collective knowledge in determining whether they behaved reasonably."); *see also United States v. Ledford*, 218 F.3d 684, 689 (7th Cir. 2000); *State v. Ragsdale*, 470 F.2d 24, 30 (5th Cir. 1972); *Smith v. State*, 719 So. 2d 1018, 1022-25 (Dist. Ct. App. Fla. 1990); *Commonwealth v. Wooden*, 433 N.E.2d 1234, 1237 (Mass. App. 1982); *State v. Bolton*, 801 P.2d 98, 113 (N.M. App. 1990).

One reason for this exception to the general rule is that "communication among officers during the exigencies of a stop or arrest may often be subtle or nonverbal." *Shareef*, 100 F.3d at 1504. Thus, this exception recognizes that officers who work closely together may "convey suspicions through nonverbal as well as verbal cues." *Shareef*, 100 F.3d at 1504 n.6.

Another reason for the exception is that a search or seizure, inevitable because of one officer's knowledge, should not be invalidated merely because a member of his team without such knowledge acted before he did. *See Ledford*, 218 F.3d at 689 (holding that where officers act in joint venture, court may properly consider knowledge of all officers: "Were it otherwise, the validity of such jointly conducted searches might turn on the fortuity of which officer happened to open a trunk or door, notwithstanding the fact that he and his colleagues were acting in concert."); *Ragsdale*, 470 F.2d at 30 ("The fact that one member of the team moved too swiftly" should not invalidate search where, had that member not begun the search when he did, the other "would surely have commanded it."); *Smith*, 719 So. 2d at 1022-25 (holding that, where officer with knowledge is in close temporal and physical proximity of search/arrest, fact that another officer beat him to punch does not defeat reasonable suspicion because, if second officer had not conducted search, almost surely first officer would have); *Wooden*, 433 N.E.2d at 1237 (holding that, although neither officer alone had sufficient knowledge to support action, where officers "were working in concert, and they were within an arm's reach of each other as well as the suspects whom they were confronting," combining their knowledge to determine reasonableness of action was appropriate); *Bolton*, 801 P.2d at 113 ("Although [first officer], the one who instructed defendants to remain, did not possess the information [the second officer] had acquired, [the second officer's] knowledge can validate the detention because of the certainty that . . . [he] would not have permitted the truck to depart."). *Cf. State v. Ochoa*, 639 P.2d 365, 368 (Ariz. App. 1981) ("It would seem hypertechnical to hold that appellant's arrest was unreasonable

simply because the race to his location was won by the only officer of all involved who did not know about the [additional information].").

In this case, both reasons support the trial court's consideration of Officer Slaugh's knowledge here. First, although Officer Slaugh testified that he did not speak with Officer Olson concerning his prior encounter with defendant, neither Slaugh nor Olson were asked—nor was the trial court ever asked to determine—whether Slaugh had communicated his concerns to Olson in some other manner, i.e., by general comments reflecting Slaugh's concerns, or by nonverbal cues. Under such circumstances, "[a] presumption of communication" between officers working together so closely is appropriate. *Shareef*, 100 F.3d at 1504 n.6.

Second, given Officer Slaugh's knowledge, inquiry by him about whether defendant possessed weapons in this case was inevitable. The fact that Officer Olson "moved too quickly and did what the more knowledgeable [Slaugh] would imminently and lawfully have done," does not render the search unreasonable. *Ochoa*, 639 P.2d at 368; *see also Ledford*, 218 F.3d at 689; *Ragsdale*, 470 F.2d at 30; *Smith*, 719 So. 2d at 1022-25; *Wooden*, 433 N.E.2d at 1237; *Bolton*, 801 P.2d at 113.

Given the lack of authoritative Utah case law on this issue, and given the extensive case law supporting the trial court's consideration of Officer Slaugh's knowledge in this case, this Court should not have decided this issue in a conclusory fashion without citing any legal authority and without briefing by the parties. This is especially so where, as previously stated, a holding on this issue was not necessary to this Court's final decision. *See Despain*,

2003 UT App 266, ¶ 10. The State therefore respectfully asks this Court to amend its opinion to omit the merits discussion of this issue.

CONCLUSION

For the reasons argued, the Court should grant rehearing to correct the errors identified above.

CERTIFICATION OF GOOD FAITH

Pursuant to Utah R. App. P. 35(a), State's counsel certifies that this petition is presented in good faith and not for delay.

DATED August 14, 2003.

MARK L. SHURTLEFF
Attorney General

Karen A. Klucznik

KAREN A. KLUCZNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing APPELLEE'S PETITION FOR REHEARING was mailed by first-class mail, postage pre-paid, to the following on August 14, 2003:

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Addendum A

2003 WL 21707634
--- P.3d ---
(Cite as: 2003 WL 21707634 (Utah App.))

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Matthew L. DESPAIN, Defendant and Appellant.

No. 20010761-CA.

July 25, 2003. .

Defendant was convicted on a conditional guilty plea in the trial court, Fourth District, Heber Department, Lynn W. Davis, J., of operating a clandestine drug laboratory. Defendant appealed. The Court of Appeals, Thorne, J., held that circumstances that officers encountered during traffic stop supported reasonable belief that defendant was armed and dangerous, and thus, officer's questioning of defendant concerning weapons possession was justified.

Affirmed.

Davis, J., filed opinion concurring and dissenting in part.

[1] Automobiles 349(18)

48Ak349(18) Most Cited Cases

Circumstances that officers encountered during traffic stop supported reasonable belief that defendant was armed and dangerous, and thus, officer's questioning of defendant concerning weapons possession was justified; it was after nightfall when officers approached defendant's vehicle, defendant ignored instruction to meet officers at patrol car, and instead reentered cab of his truck and closed door, and when defendant complied with officer's repeated request to meet officers at patrol car he approached them wearing shirt that obscured from officers' view any object that he may have secreted in or around his waistband. U.S.C.A. Const.Amend. 4; U.C.A.1953, 58-37d-4.

[2] Criminal Law 1139

110k1139 Most Cited Cases

[2] Criminal Law 1158(4)

110k1158(4) Most Cited Cases

An appellate court reviews factual findings underlying a trial court's decision to grant or deny a motion to suppress evidence using a clearly erroneous standard; however, it reviews the trial court's conclusions of law based on these findings for correctness, with a measure of discretion given to the trial judge's application of legal standard to facts.

[3] Searches and Seizures 23

349k23 Most Cited Cases

To determine whether a search or a seizure is constitutionally reasonable, an appellate court must first determine whether officer's action was justified at its inception; if so, it then considers whether resulting detention was reasonably related in scope to the circumstances that justified the interference in the first place. U.S.C.A. Const.Amend. 4.

[4] Automobiles 349(3)

48Ak349(3) Most Cited Cases

A traffic stop is justified at its inception when the stop is incident to a traffic violation committed in an officer's presence. U.S.C.A. Const.Amend. 4.

[5] Automobiles 349(18)

48Ak349(18) Most Cited Cases

During a traffic stop an officer may request a driver's license and vehicle registration, conduct a computer check, and issue a citation. U.S.C.A. Const.Amend. 4.

[6] Automobiles 349(18)

48Ak349(18) Most Cited Cases

Any further temporary detention for investigative questioning after fulfilling the purpose for initial traffic stop constitutes an illegal seizure, unless an officer has probable cause or a reasonable suspicion of a further illegality. U.S.C.A. Const.Amend. 4.

[7] Arrest 63.5(8)

35k63.5(8) Most Cited Cases

Where police officer validly stops individual for investigatory or other purposes and reasonably believes that individual may be armed and dangerous, officer

may conduct a "frisk" or "pat-down" search of individual, or question individual regarding presence of weapons, to discover weapons that might be used against him. U.S.C.A. Const.Amend. 4.

[8] Arrest ⚿63.5(8)
35k63.5(8) Most Cited Cases

If a *Terry* frisk, which may be limited to officer simply asking about presence of weapons, is challenged by defendant following his arrest, state must support officer's action by presenting articulable facts that would reasonably lead an objective officer to conclude that suspect may be armed; basis for this policy is the recognition that facts and circumstances unique to the particular suspect and/or factual context may give rise to a reasonable suspicion the suspect may be armed. U.S.C.A. Const.Amend. 4.

[9] Arrest ⚿63.5(8)
35k63.5(8) Most Cited Cases

If a *Terry* frisk, or questioning of a citizen about the presence of a weapon, is challenged by defendant following his arrest, state must present articulable facts that would reasonably lead an objective officer to conclude that suspect may be armed. U.S.C.A. Const.Amend. 4.

G. Fred Metos, McCaughey & Metos, Salt Lake City, for Appellant.

Mark L. Shurtleff, Attorney General, Jeffrey T. Colemere, Smart Schofield Shorter & Lunceford, and Kirk M. Torgensen, Attorney Generals Office, Salt Lake City, for Appellee.

Before Judges DAVIS, GREENWOOD, and THORNE.

OPINION

THORNE, Judge:

*1 ¶ 1 Defendant Matthew Despain appeals from his conditional guilty plea to operating a clandestine drug laboratory, a second degree felony, in violation of Utah Code Annotated Section 58-37d-4 (Supp.2001). We affirm.

BACKGROUND

¶ 2 On November 6, 1999, Despain, his wife, and their young son were traveling southbound on SR 40, near Heber, Utah. At about midnight, near the intersection of SR 40 and SR 189, Heber City Police Officer Troy Slaugh noticed that the license plate attached to Despain's fifth wheel trailer was not properly lit. Accordingly, Slaugh called dispatch with the license plate number and learned that the vehicle belonged to Despain. Slaugh immediately recognized that he had had contact with Despain recently and that the previous contact had resulted in Despain being charged with both a narcotics violation and a concealed weapon violation.

¶ 3 Armed with this information, Slaugh initiated a traffic stop of Despain. Despain pulled over and Slaugh parked behind the fifth-wheel trailer. Both Slaugh and his partner, Officer Rusty Olsen, then got out of the patrol car and cautiously approached Despain's vehicle. As the officers neared the bed of Despain's truck, Despain's rottweiler stood up, lunged toward Slaugh and began barking furiously, causing both officers to draw their sidearms and retreat back to the patrol car. Slaugh then yelled for Despain, who at that point had exited his truck, to meet the officers near the patrol car, away from the truck and the dog. Despain, instead, got back into the cab of the truck and closed the door, obscuring his subsequent actions from the officers' view. Slaugh again yelled to Despain, ordering him to meet the officers by the patrol car. Despain then exited the truck and walked back to the officers.

¶ 4 While he walked, both officers noticed that Despain was dressed in blue jeans and a very loose, baggy shirt that hung down over his hips. When he reached the officers, Slaugh asked for Despain's driver license and registration while Olsen asked Despain if he was carrying any weapons on his person. Despain admitted that he had two knives and began reaching toward his waist. Olsen intervened, grabbing and searching Despain, whereupon he discovered and confiscated two knives. The first knife, a smaller knife with a folding blade, was attached vertically to Despain's belt and was in a secured covered sheath. The second knife, however, was a large heavy knife with a fixed blade, loosely placed in a sheath attached horizontally across Despain's belly unsecured by either a cover or a strap. After a short consultation, Slaugh placed Despain under arrest for possession of a concealed dangerous weapon. The officers then conducted a search of the vehicle incident to the arrest and discovered evidence that Despain intended to produce, or was in the process of producing, methamphetamine. [FN1]

¶ 5 Following his arrest, the State charged Despain with possession or operating a clandestine drug laboratory, possession or use of a controlled substance by a person with a prior conviction, transportation or possession of items prohibited in a correctional and mental health facility, reckless endangerment,

possession of drug paraphernalia, and carrying a concealed dangerous weapon. Despain filed a motion to suppress all evidence discovered as a result of Olsen's question, arguing that the question was not supported by reasonable suspicion. Thus, Despain argues his arrest and the subsequent search of his vehicle incident to the arrest were unconstitutional. On November 15, 2000, the trial court conducted a suppression hearing. The court then denied Despain's motion, following which Despain entered into a plea agreement with the State, pleading guilty to the clandestine drug lab charge. In accepting the plea agreement, pursuant to *State v. Sery*, 758 P.2d 935 (Utah Ct.App.1988), Despain preserved the suppression issue for appeal.

ANALYSIS

***2** [1][2] ¶ 6 Despain argues that the trial court erred in denying his motion to suppress the evidence discovered as a result of Olsen's question concerning weapons possession. " 'We review the factual findings underlying the trial court's decision to grant or deny a motion to suppress evidence using a clearly erroneous standard.' " *State v. Kohl*, 2000 UT 35, ¶ 9, 999 P.2d 7 (quoting *State v. Pena*, 869 P.2d 932, 939 n. 4 (Utah 1994)). "However, we review the trial court's conclusions of law based on these findings 'for correctness, with a measure of discretion given to the trial judge's application of the legal standard to the facts.' " *Id.* (quoting *State v. Moreno*, 910 P.2d 1245, 1247 (Utah Ct.App.1996)).

[3][4][5][6] ¶ 7 "To determine whether a search or a seizure is constitutionally reasonable, we must first determine whether the officer's action was ' "justified at its inception." ' " *State v. Chapman*, 921 P.2d 446, 450 (Utah 1996) (quoting *State v. Lopez*, 873 P.2d 1127, 1132 (Utah 1994) (additional citation omitted)). "If so, we then consider whether the resulting detention was ' "reasonably related in scope to the circumstances that justified the interference in the first place." ' " *Id.* (citations omitted). "[A] traffic stop is justified at its inception when 'the stop is "incident to a traffic violation committed in [an officer's] presence." ' " *State v. Hansen*, 2002 UT 125, ¶ 30, 63 P.3d 650 (alterations in original) (citations omitted). Moreover, "during a traffic stop an officer 'may request a driver's license and vehicle registration, conduct a computer check, and issue a citation.' " *Id.* at ¶ 31 (quoting *Lopez*, 873 P.2d at 1132) (additional citations omitted). " ' "Any further temporary detention for investigative questioning after [fulfilling] the purpose for the initial traffic stop" ' constitutes an illegal seizure, unless an officer has probable cause or a reasonable suspicion of a further illegality." *Id* (quoting *State v. Godina-Luna*, 826 P.2d 652, 655 (Utah Ct.App.1992) (alteration in original) (additional citations omitted)).

[7][8] ¶ 8 However, " '[w]here a police officer validly stops an individual for investigatory or other purposes *and reasonably believes that the individual may be armed and dangerous*, the officer may conduct a "frisk" or "pat-down" search of the individual, [or question the individual regarding the presence of weapons,] to discover weapons that might be used against him.' " *State v. Warren*, 2001 UT App 346, ¶ 13, 37 P.3d 270 (quoting *State v. Carter*, 707 P.2d 656, 659 (Utah 1985)), *cert. granted*, 2002 Utah LEXIS 152. However, if the *Terry* frisk, which may be limited to the officer simply asking about the presence of weapons, is challenged by the defendant following his arrest, "the State must [support the officer's action by] present[ing] articulable facts that would reasonably lead an objective officer to conclude that the suspect may be armed." *Id.* at ¶ 14 (quoting *Carter*, 707 P.2d at 659).

***3** ¶ 9 In the instant case, there is no question, and Despain does not argue otherwise, that the traffic stop was justified at its inception. The license plate on Despain's fifth-wheel trailer was not properly illuminated, thus, pursuant to Utah Code Annotated Section 41-6-120(b) (1998), Slaugh and Olsen were justified in stopping Despain to cite him for the violation. However, it is also clear that Olsen's questioning of Despain concerning weapons possession lies outside the scope of the reason for the initial stop. Therefore, we must determine whether the circumstances that the officers encountered during the stop supported either "a reasonable suspicion of a further illegality" sufficient to justify the question, *Hansen*, 2002 UT 125 at ¶ 31, 63 P.3d 650, or the reasonable belief that Despain was armed and dangerous. *See Warren*, 2001 UT App 346 at ¶ 13, 37 P.3d 270. [FN2]

¶ 10 Despain argues that the trial court erred in relying upon the prior encounter between Slaugh and Despain to support its decision that Olsen's question was supported by reasonable suspicion. We agree. [FN3] However, "[i]t is well settled that we may affirm a judgment of a lower court if it is sustainable on any legal ground or theory apparent on the record." *State v. Finlayson*, 2000 UT 10, ¶ 31, 994 P.2d 1243. [FN4]

[9] ¶ 11 In the instant case, the record supports Olsen's actions because the circumstances surrounding the traffic stop support a reasonable belief that Despain was armed and dangerous. " 'Where a police officer validly stops an individual for investigatory or other purposes *and reasonably believes that the individual may be armed and dangerous*, the officer may conduct a "frisk" or "patdown" search of the individual, [or question the individual regarding the presence of weapons,] to discover weapons that might be used against him.' " *Warren*, 2001 UT App 346 at ¶ 13, 37 P.3d 270

(quoting *Carter*, 707 P.2d at 659. However, if the *Terry* frisk, or the questioning of a citizen about the presence of a weapon, is challenged by the defendant following his arrest, "the State must present articulable facts that would reasonably lead an objective officer to conclude that the suspect may be armed." *Id.* at ¶ 14 (quoting *Carter*, 707 P.2d at 659). The basis for this policy is the recognition that "facts and circumstances unique to the particular suspect and/or factual context may give rise to a reasonable suspicion the suspect may be armed." *Warren*, 2001 UT App 346 at ¶ 15, 37 P.3d 270.

¶ 12 Here, it was well after nightfall when the officers approached Despain's vehicle. Before they reached the cab of the truck, they were accosted by an apparently dangerous dog, prompting both officers to draw their sidearms and retreat to their patrol car where Slaugh noticed for the first time that Despain had dismounted his vehicle. Slaugh then instructed Despain to meet the officers at the patrol car, an instruction which Despain completely ignored. He instead reentered the cab of his truck and closed the door concealing any actions he may have taken within the truck. When Despain finally complied with Slaugh's repeated request to meet the officers at the patrol car he approached them wearing an untucked, overly-large shirt that obscured from the officers' view any object that Despain may have secreted in or around his waistband.

***4** ¶ 13 Based on the factual circumstance of this case, we conclude that an objective police officer in Olsen's position would have drawn a similar conclusion--that Despain may in fact be armed and dangerous--and that an objective officer, concerned for his safety and the safety of others, would have asked Despain the same question. *See Warren*, 2001 UT App 346 at ¶ 14, 37 P.3d 270 (quoting *Carter*, 707 P.2d at 659). Thus, we conclude that Olsen's question to Despain was supported by a reasonable suspicion that Despain was armed and dangerous.

CONCLUSION

¶ 14 Based on Despain's conduct during the traffic stop, it was reasonable for Olsen to believe that Despain was possibly armed and dangerous. Accordingly, we affirm the trial court's denial of Despain's motion to suppress.

¶ 15 I CONCUR: PAMELA T. GREENWOOD, Judge.

DAVIS, Judge (concurring and dissenting):

¶ 16 I concur with the majority's analysis through footnote 3, together with its recital of the law applicable to "frisk" or "patdown" searches or questions about the presence of weapons.

¶ 17 Since we are bound by the record and caselaw respecting Officer Olsen's apparently limited knowledge, and must approach this case accordingly, I cannot agree with the majority's conclusion that Officer Olsen had reasonable, articulable suspicion to inquire whether Despain possessed any weapons. " 'Investigative questioning that further detains the driver must be supported by reasonable suspicion of more serious criminal activity. Reasonable suspicion means suspicion based on specific, articulable facts drawn from the totality of the circumstances facing the officer at the time of the stop.' " *State v. Lafond*, 2003 UT App 101, ¶ 13, 68 P.3d 1043 (citations omitted), *cert. denied*, 72 P.3d 685, 2003 Utah LEXIS 59 (Utah 2003). "The legality of a frisk for weapons[or a question regarding weapons], absent probable cause, is governed by *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and [Utah Code Ann. § 77-7-16 (1999)]." *Lafond*, 2003 UT App 101 at ¶ 18, 68 P.3d 1043 (footnote omitted).

¶ 18 Two basic scenarios warrant a *Terry* frisk for weapons: (1) the "facts and circumstances unique to the particular suspect and/or factual context"; and (2) "the inherent nature of the crime being investigated." *Id.* at ¶ 19 (quotations and citations omitted). Under the first scenario, the "facts and circumstances" that "may give rise to reasonable suspicion [that a] suspect may be armed" include bulges in clothing or other items appearing to be weapons; or a suspect who denies possessing a weapon, yet aggressively approaches an officer. *Id.* (quotations and citations omitted). Factors that do not amount to reasonable, articulable suspicion include a suspect's wearing of layered, baggy clothing; or mere nervousness not accompanied with aggressive or threatening behavior. *See id.* at ¶¶ 20-21.

¶ 19 Under the second scenario, the types of crimes whose nature "suggest[s] the presence of weapons include: robbery, burglary, rape, assault with weapons, homicide, and dealing in large quantities of narcotics." *Id.* at ¶ 19 (quotations and citations omitted). Lesser traffic offenses do not fit within this category. For lesser traffic offenses we have required "particular facts [to] lead [an] officer to believe that a suspect is armed." *Id.* (quotations and citations omitted).

***5** ¶ 20 Neither scenario existed in this case. Officers Slaugh and Olsen stopped Despain because the license plate light on his trailer was not lighted and after they ascertained the trailer was registered to Despain. Officer Slaugh remembered Despain from a prior

encounter that resulted in narcotics and concealed weapon charges. Apparently, Officer Slaugh did not communicate this information to Officer Olsen, and Officer Olsen testified that he had no knowledge of Despain's prior encounter with Officer Slaugh. The majority then holds that the following facts establish that Officer Olsen had reasonable, articulable suspicion to ask Despain about weapons: Despain approached the officers "wearing an untucked, overly large shirt that [could have] obscured any object that [he] may have [hidden] in his waistband"; Despain exited the cab of his truck, re-entered the cab, closed the door (thus "completely ignor [ing]" the officers), and then re-exited the cab; the officers encountered "an apparently dangerous dog" in the bed of the truck; and the traffic stop occurred at night.

¶ 21 In my view, these circumstances do not amount to reasonable, articulable suspicion. First, there was no evidence that would indicate that Officer Olsen could reasonably believe that Despain possessed weapons on his body. No evidence was presented that Despain's clothing exhibited bulges or any other indications of weapons that would warrant a question regarding weapons. *See id.* Rather, Officer Olsen could point only to Despain's untucked, overly large shirt that may have obscured any weapon hidden in Despain's waistband. This court has found that "baggy, layered clothing," does not amount to reasonable, articulable suspicion by itself. *Id.* at ¶ 21. Similarly, Officer Olsen's belief that Despain may have tucked away a weapon in his waistband, absent any evidence that would otherwise indicate the presence of a weapon, does not amount to reasonable, articulable suspicion. *See id.* (noting that "officer's testimony that he performed a patdown search because suspect ' "potentially may have been armed" ... add[ed] nothing' to the reasonable suspicion determination because '[i]n every encounter with a citizen by the police, the citizen may potentially be armed.' " (alterations in original) (quoting *People v. Dickey*, 21 Cal.App.4th 952, 27 Cal.Rptr.2d 44, 46 (1994))); *cf. State v. White*, 856 P.2d 656, 661 (Utah Ct.App.1993) (holding that "simply wearing a winter coat" is not a factor that would indicate whether a suspect was armed).

¶ 22 Second, there was no evidence that Despain aggressively approached the officers. *See Lafond*, 2003 UT App 101 at ¶ 20, 68 P.3d 1043. Although Despain re-entered the cab when the officers first ordered him to approach them, he eventually complied and walked toward them. While the majority argues that Despain "completely ignored" the officers' request, this characterization is an overstatement. There is no evidence that indicates how long Despain "ignored" the officers' request to approach. The record does show that Despain exited the cab and approached the officers after the officers' second order. Logic suggests that Despain re-entered the cab of his vehicle to retrieve documentation, particularly when confronted by two police officers with their dangerous weapons drawn.

***6** ¶ 23 While it makes sense for the officers to retreat from the "apparently dangerous dog," I fail to see how this creates a reasonable, articulable suspicion that Despain may have been armed. If anything, the presence of Despain's dangerous dog cuts against the notion that Despain would feel the need to carry weapons.

¶ 24 Finally, the majority factors the nighttime traffic stop into its reasonable, articulable suspicion analysis. I fail to see how a nighttime traffic stop creates a reasonable, articulable suspicion that an individual may be armed. Individuals may be armed day or night. Our law requires officers to point to "specific, articulable facts" regarding the suspect to allow an officer to conduct a *Terry* frisk or to question a suspect for weapons. *Id.* at ¶ 13 (quotations and citations omitted). The time of day of a police encounter adds nothing relevant to the reasonable, articulable suspicion analysis.

¶ 25 Based on the foregoing, I dissent from the majority's conclusion that Officer Olsen had reasonable, articulable suspicion to inquire whether Despain had any weapons.

FN1. Despain does not challenge the officer's search of his vehicle and trailer incident to his arrest.

FN2. The State urges this court to adopt a rule that would make an officer's inquiry into the presence of weapons reasonable per se regardless of whether the question is supported by other reasonable suspicion. *See United States v. Holt*, 264 F.3d 1215, 1225-26 (10th Cir.2001) (concluding that an officer's questioning of a motorist concerning the presence of a *loaded* weapon does not violate the Fourth Amendment of the United States Constitution. Thus, in the Tenth Circuit, questions concerning loaded weapons are considered to be within the normal course of a traffic stop.). Without addressing the applicability of *Holt* to the instant case, we decline to adopt such a rule because (1) adopting such a position would be contrary to existing supreme court doctrine, *see State v. Hansen*, 2002 UT 125, ¶¶ 30-32, 63 P.3d 650 (highlighting the limited and prescribed

behavior allowed by police officers during the temporary detention of a citizen); and (2) our conclusion that Despain's behavior following the stop reasonably led the officers to believe that he was armed and dangerous forecloses any need to adopt the position urged by the State. Accordingly, we limit our analysis to the traditional confines of police-citizen encounters and reserve our analysis of the State's suggestion for an appropriate case.

FN3. The trial court relied on the prior contact between Slaugh and Despain to support its decision to deny Despain's motion to suppress. However, Slaugh merely asked Despain for his license and registration, while it was Olsen who asked Despain about weapons. Moreover, Olsen did not know of the prior encounter between Slaugh and Despain and the testimony of Slaugh makes clear that Olsen had no reason to believe anything more than a simple traffic stop was occurring prior to their approaching the truck to complete the traffic stop. Accordingly, because Olsen had no history with Despain and was not aware of Slaugh's history with Despain, the trial court erred in considering the prior encounter as material to the issue.

FN4. Despain does not challenge the trial court's factual findings; thus, we accept them as drafted by the court.

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